

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KATHLEEN McDERMED,

Plaintiff,

vs.

ACES HIGH MANAGEMENT d/b/a,
SADDLE WEST HOTEL, CASINO and RV
RESORT; ROE CORPORATIONS I-X,
inclusive, and JOHN DOES I-X, inclusive,

Defendants.

Case No.: 2:10-cv-01087-RLH-LRL

ORDER

(Motion to Dismiss—#11)

Before the Court is Defendant Aces High Management and Saddle West Hotel, Casino and RV Resort's ("Saddle West") Motion to Dismiss for Lack of Jurisdiction, or in the alternative, Request for Settlement Conference (#11, filed Jan. 4, 2011). The Court has also considered Plaintiff Kathleen McDermed's Opposition (#16, filed Feb. 4, 2011), and Saddle West's Reply (#14, filed Feb. 8, 2011).

BACKGROUND

McDermed, a California resident, alleges that she slipped and fell on a wet sidewalk at the Saddle West Hotel, Casino RV Resort located in Pahrump, Nevada on July 6, 2008. (Dkt. #11, Mot., 2:4–6.) McDermed alleges that Saddle West negligently allowed unsafe

1 conditions on the hotel premises which caused McDermed's fall and resulted in injuries to her
 2 knee, back, and other parts of her body. (Dkt. #1, Compl., ¶¶10-11.) Further, McDermed claims
 3 that her injuries required her to seek medical treatment for extreme physical pain. (*Id.* ¶¶12-13.)
 4 McDermed claims that her medical expenses to date are in excess of \$38,205.54. Additionally,
 5 McDermed claims that the surgical procedures she is expected to undergo are anticipated to push
 6 her medical expenses in excess of \$100,000.00.

7 On July 1, 2010, McDermed filed suit based on diversity jurisdiction alleging
 8 negligence. Saddle West now asks the Court to dismiss the suit for lack of subject matter
 9 jurisdiction, or in the alternative, to order a settlement conference. Saddle West argues that
 10 McDermed's medical expenses do not exceed \$75,000, thus the Court does not have diversity
 11 jurisdiction over the suit. For the reasons discussed below, the Court denies Saddle West's motion
 12 to dismiss and refers the request for settlement conference to Magistrate Judge Lawrence R.
 13 Leavitt.

14 DISCUSSION

15 Because dismissal of the case for lack of subject matter jurisdiction will end the
 16 Court's ability to refer this case for a settlement conference, the Court first analyzes the
 17 jurisdictional issues Saddle West raises in its motion to dismiss.

18 I. Saddle West's Motion to Dismiss for Lack of Jurisdiction

19 A. Legal Standard

20 "In this action, as in all actions before a federal court, the necessary and
 21 constitutional predicate for any decision is a determination that the court has jurisdiction—that is
 22 the power—to adjudicate the dispute." *Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998).
 23 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows defendants to seek dismissal of a
 24 claim or action for lack of subject matter jurisdiction. Dismissal under Rule 12(b)(1) is
 25 appropriate if the complaint, considered in its entirety, fails to allege facts on its face that are
 26 sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM)*

1 *Antitrust*, 546 F.3d 981, 984-85 (9th Cir. 2008). Although the defendant is the moving party in a
 2 motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the court's
 3 jurisdiction. As a result, the plaintiff bears the burden of proving that the case is properly in
 4 federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v.*
 5 *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

6 Federal courts are courts of limited jurisdiction. *Owen Equip & Erection Co. V.*
 7 *Kroger*, 437 U.S. 365, 374 (1978). "A federal court is presumed to lack jurisdiction in a particular
 8 case unless the contrary affirmatively appears." *Stock West, Inc. V. Confederated Tribes of the*
 9 *Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Subject matter jurisdiction is a
 10 threshold issue that goes to the power of the court to hear a case, thus the issue may be raised at
 11 any time and by any party. Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(h). A district court must
 12 dismiss a case when no subject matter jurisdiction exists. Fed. R. Civ. P. 12(h).

13 A motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) or
 14 12(h)(3) challenges the court's subject matter jurisdiction. The Court accepts the allegations in the
 15 complaint as true when ruling on a motion to dismiss for lack of subject matter jurisdiction. *Wolfe*
 16 *v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The court, however, is not limited to the
 17 pleadings and may review evidence, including affidavits and testimony, to resolve factual disputes
 18 regarding jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 5600 (9th Cir. 1988), *cert.*
 19 *denied*, 489 U.S. 1052, 109 S. Ct. 1312, 103 L. Ed. 581 (1989).

20 **B. Diversity Jurisdiction**

21 To establish subject matter jurisdiction pursuant to diversity of citizenship, the
 22 party asserting jurisdiction must show: (1) complete diversity of citizenship among opposing
 23 parties, and (2) an amount in controversy exceeding \$75,000. 28 U.S.C. § 1332(a). The Court
 24 will only examine the amount in controversy as Saddle West does not dispute that the parties are
 25 diverse.

26 The Court generally determines the amount in controversy from the face of the

pleadings. *Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 363 (9th Cir. 1986) (citing *St. Paul Mercury Indemnity Co. V. Red Cab Co.*, 303 U.S. 283, 288-89, 822 L.Ed. 845, 58 S. Ct. 586 (1938)). Unless the relevant law specifies a different rule, the plaintiff's claimed sum of damages controls if the claim is made in apparent good faith. *Id.* at 363-64. To justify dismissal, the Court considers whether it is a legal certainty that the claim is really for less than the jurisdictional amount. *Id.* at 364. The legal certainty test is deferential to a plaintiff's claim and makes securing dismissal for an insufficient amount in controversy very difficult. *Id.* A suit will only be dismissed if to a legal certainty, from the face of the pleadings, the plaintiff cannot recover the amount claimed, or if the court is satisfied to a legal certainty, from the evidence, that the plaintiff was never entitled to recover that amount. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 401 (9th Cir. 1996).

Saddle West claims that McDermid can only show medical expenses totaling \$38,205.54, however, McDermid's complaint alleges current damages in excess of the \$75,000 required to establish jurisdiction. Further, McDermid alleges future medical expenses in excess of \$100,000 following surgical procedures required to treat her injuries. (#16, Opp., 8:8-10.) Thus, on the face of the pleadings and upon reply to the defendant's motion, McDermid adequately claims damages exceeding \$75,000 for medical expenses and procedures. McDermid's claimed sum is controlling because McDermid's claim is made in apparent good faith. Although Saddle West has shown a possibility that McDermid may not recover damages in excess of \$75,000, Saddle West has not established to a legal certainty that McDermid's claim is really for less than the jurisdictional requirement. Accordingly, the Court denies the motion.

II. Defendants' Request for Settlement Conference

Under Federal Rule of Civil Procedure 16 and the Local Rules of Practice, the Court may grant a request for a settlement conference. Both parties agree that a settlement conference is appropriate. The request is thus referred to Magistrate Judge Lawrence R. Leavitt.

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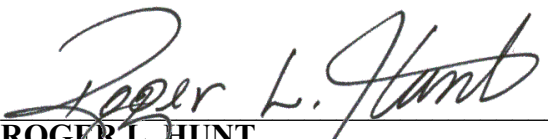
CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#11) is DENIED.

IT IS FURTHER ORDERED that Defendant's Request for Settlement Conference
(#11) is referred to Magistrate Judge Lawrence R. Leavitt.

Dated: June 10, 2011


ROGER L. HUNT
United States District Judge